PROFESSOR GEOFFREY STONE'S SPEECH, ''CIVIL LIBERTIES IN WARTIME''

Mr. DURBIN. Mr. President, I ask unanimous consent to print in the RECORD a speech by University of Chicago Law Professor Geoffrey Stone on ''Civil Liberties in Wartime,'' delivered at the annual luncheon of the Chicago Council of Lawyers on July 23. Professor Stone thoughtfully reviews America's history of restricting civil liberties during times of war and our subsequent regret for those decisions. His speech invites reflection by the Members of this Senate as we debate important issues of national security and civil rights, and counsels us to ''value not only [our] own liberties but the liberties of others . . . and to have the wisdom to know excess when it exists and the courage to preserve liberty when it is imperiled.''

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CIVIL LIBERTIES IN WARTIME

(By Geoffrey R. Stone)

We live in perilous times. This is true along several dimensions, but I focus this afternoon on only one of them: Civil Liberties in Wartime. Or, more precisely, how are we, as a nation, responding to the threat of terrorism?

Since September 11th, our government, in our name, has secretly arrested and detained more than a thousand non-citizens; it has deported hundreds of non-citizens in secret proceedings; it has eviscerated long-standing Justice Department restrictions on FBI surveillance of political and religious activities; it has vastly expanded the power of federal officials to invade the privacy of our libraries and our e-mails; it has incarcerated an American citizen, arrested on American soil, for almost a year—incommunicado, with no access to a lawyer, and with no effective judicial review; it has sharply restricted the protections of the Freedom of Information Act; it has proposed a TIPS program to encourage American citizens to spy on one another; it has laid the groundwork for a Department of Defense Total Information Awareness program to enable the government to engage in massive and unprecedented data collection on American citizens; it has detained a thousand prisoners of war in Guantanamo Bay in cynical disregard of the laws of war; and it has established military tribunals without due process protections. We live in perilous times.

Of course, we have lived in perilous times before. What I want to discuss this afternoon is how we have responded to such peril in the past, what we can learn from those experiences, and what our responsibilities are as lawyers.

I have a simple thesis: In time of war, we respond too harshly in our restriction of civil liberties, and then, later, regret our behavior. To test this thesis, I will review, very briefly, our experiences in 1798, the Civil War, World War I, World War II, the Cold War and the Viet Nam War. I will then offer some observations.

To begin, at the beginning. In 1798, the United States found itself embroiled in a European war that then raged between France and England. A bitter political and philosophical debate divided the Federalists, who favored the English, and the Republicans, who favored the French. The Federalists were then in power, and the administration of President John Adams initiated thus a dramatic series of defense measures that brought the United States into a state of undeclared war with France.

The Republicans fiercely opposed these measures, leading the Federalists to accuse them of disloyalty. President Adams, for example, declared that the Republicans ''would sink the glory of our country and prostrate her liberties at the feet of France.'' Against this backdrop, the Federalists enacted the Alien and Sedition Acts of 1798. The Alien Act empowered the President to deport any non-citizen he judged to be dangerous to the peace and safety of the United States. The Act accorded the non-citizen no right to a hearing, no right to present evidence and no right to judicial review.

The Sedition Act prohibited criticism of the government, the Congress or the President, with the intent to bring them into contempt or disrepute. The Act was vigorously enforced, but only against supporters of the Republican Party. Prosecutions were brought against every Republican newspaper and against the most vocal critics of the Adams administration.

The Sedition Act expired on the last day of Adams's term of office. The new President, Thomas Jefferson, promptly pardoned all those who had been convicted under the Act, and forty years later Congress repaid all the fines. The Sedition Act was a critical factor in the demise of the Federalist Party, and the Supreme Court has never missed an opportunity in the years since to remind us that the Sedition Act of 1798 has been judged unconstitutional in the ''court of history.''

During the Civil War, the nation faced its most serious challenge. There were sharply divided loyalties, fluid military and political boundaries, easy opportunities for espionage and sabotage, and more than 600,000 combat fatalities. In such circumstances, and in the face of widespread and often bitter opposition to the war, the draft and the Emancipation Proclamation, President Lincoln had to balance the conflicting interests of military necessity and individual liberty.

During the course of the Civil War, Lincoln suspended the writ of habeas corpus on eight separate occasions. The most extreme of these suspensions, which applied throughout the entire nation, declared that ''all persons . . . guilty of any disloyal practice . . . shall be subject to court martial.'' Under this authority, military officers arrested and imprisoned 38,000 civilians, with no judicial proceedings and no judicial review.

In 1866, a year after the war ended, the Supreme Court ruled in Ex parte Milligan that Lincoln had exceeded his constitutional authority, holding that the President could not constitutionally suspend the writ of habeas corpus, even in time of war, if the ordinary civil courts were open and functioning.

The story of civil liberties during World War I is, in many ways, even more disturbing. When the United States entered the war in April 1917, there was strong opposition to both the war and the draft. Many citizens vehemently argued that our goal was not to ''make the world safe for democracy,'' but to protect the investments of the wealthy, and that this cause was not worth the life of one American soldier, let alone ten or hundreds of thousands.

President Wilson had little patience for such dissent. He warned that disloyalty ''must be crushed out'' of existence and that disloyalty ''was . . . not a subject on which there was room for . . . debate.'' Disloyal individuals, he explained, ''had sacrificed their right to civil liberties.''

Shortly after the United States entered the war, Congress enacted the Espionage Act of 1917. Although the Act was not directed at dissent generally, aggressive federal prosecutors and compliant Federal judges soon transformed it into a blanket prohibition of seditious utterance. The administration's intent in this regard was made evident in November 1917 when Attorney General Charles Gregory, referring to war dissenters, declared: ''May God have mercy on them, for they need expect none from an outraged people and an avenging government.''

In fact, the government worked hard to create an ''outraged people.'' Because there had been no direct attack on the United States, and no direct threat to our national security, the Wilson administration had to generate a sense of urgency and anger in order to exhort Americans to enlist, to contribute money and to make the many sacrifices that war demands. To this end, Wilson established the Committee for Public Information, which produced a flood of inflammatory and often misleading pamphlets, news releases, speeches, editorials and motion pictures, all designed to instill a hatred of all things German and of all persons whose ''loyalty'' might be open to doubt.

During World War I, the government prosecuted more than 2,000 dissenters for opposing the war or the draft, and in an atmosphere of fear, hysteria and clamor, most judges were quick to mete out severe punishment—often 10 to 20 years in prison—to those deemed disloyal. The result was the suppression all genuine debate about the merits, the morality and the progress of the war.

But even this was not enough. A year later, Congress enacted the Sedition Act of 1918, which expressly prohibited any disloyal, scurrilous, or abusive language about the form of government, the Constitution, the flag, the uniform, or the military forces of the United States. Even the Armistice didn't bring this era to a close, for the Russian Revolution triggered a period of intense public paranoia in the United States, known to us today as the ''Red Scare'' of 1919–1920. Attorney General A. Mitchell Palmer unleashed a horde of undercover agents to infiltrate so-called radical organizations, and in a period of only two months the government arrested more than 5,000 American citizens and summarily deported more than a thousand aliens on ''suspicion'' of radicalism.

The story of the Supreme Court in this era is too familiar, and too painful, to bear repeating in detail. In a series of decisions in 1919 and 1920—most notably Schenck, Debs, and Abrams—the Court consistently upheld the convictions of individuals who had agitated against the war and the draft—individuals as obscure as Mollie Steimer, a twenty-year-old Russian-Jewish émigré who had thrown anti-war leaftlets in Yiddish from a rooftop on the lower East Side of New York, and as prominent as Eugene Debs, who had received almost a million votes in 1912 as the Socialist Party candidate for President.

As Harry Kalven has observed, these decisions left no doubt of the Court's position: ''While the nation is at war, serious, abrasive criticism . . . is beyond constitutional protection.'' These decisions, he added, ''are dismal evidence of the degree to which the mood of society can penetrate judicial chambers.'' The Court's performance was ''simply wretched.''

In December 1920, after all the dust had settled, Congress quietly repealed the Sedition Act of 1918. Between 1919 and 1923, the government released from prison every individual who had been convicted under the Espionage and Sedition Acts. A decade later, President Roosevelt granted amnesty to all of these individuals, restoring their full political and civil rights. Over the next half-century, the Supreme Court overruled every one of its World War I decisions, holding in effect that every one of the individuals who

had been imprisoned or deported in this era for his or her dissent had been punished for speech that should have been protected by the First Amendment.

On December 7, 1941, Japan attacked Pearl Harbor. Two months later, on February 19, 1942, President Roosevelt signed Executive Order 9066, which authorized the Army to ''designate military areas'' from which ''any persons may be excluded.'' Although the words ''Japanese'' or ''Japanese American'' never appeared in the Order, it was understood to apply only to persons of Japanese ancestry.

Over the next eight months, 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon and Arizona. Two-thirds of these individuals were American citizens, representing almost 90% of all Japanese-Americans. No charges were brought against these individuals; there were no hearings; they did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them. Many families lost everything.

On the orders of military police, these individuals were transported to one of ten internment camps, which were located in isolated areas in wind-swept deserts or vast swamp lands. Men, women and children were placed in overcrowded rooms with no furniture other than cots. They found themselves surrounded by barbed wire and military police, and there they remained for three years.

In Korematsu v. United States, decided in 1944, the Supreme Court, in a six-to- three decision, upheld the President's action. The Court offered the following explanation:

We are not unmindful of the hardships imposed upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. Korematsu was not excluded from the West Coast because of hostility to his race, but because the military authorities decided that the urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the area. We cannot—by availing ourselves of the calm perspective of hindsight—say that these actions were unjustified.

In 1980, a congressional commission declared that the Japanese internment had been based, not on considerations of military necessity, but on crass racial prejudice and political expediency. Eight years later, President Reagan signed the Civil Liberties Restoration Act of 1988, which offered an official Presidential apology and reparations to each of the Japanese-American internees who had suffered discrimination, loss of liberty, loss of property and personal humiliation because of the actions of the United States government.

As World War II drew to a close, the nation moved almost seamlessly into the Cold War. As the glow of our wartime alliance with the Soviet Union evaporated, President Truman came under increasing attack from a coalition of Southern Democrats and anti-New Deal Republicans who sought to exploit fears of Communist aggression. As House Republican leader Joe Martin declared on the eve of the 1946 election, ''the people will choose tomorrow 'between communism and the preservation of our American life.'' The next day, the Democrats lost 56 seats in the House.

Thereafter, the issue of loyalty became a shuttlecock of party politics. By 1948, President Truman was boasting on the stump that he had imposed on the federal civil service the most extreme loyalty program in the entire ''Free World,'' and he had. But there were limits to Truman's anti-communism. In 1950, he vetoed the McCarren Act, which required the registration of all Communists. Truman explained that the Act was the product of ''public hysteria'' and would lead to ''witch hunts.'' Congress passed the Act over Truman's veto.

In 1954, Congress enacted the Communist Control Act, which stripped the Communist Party of ''all rights, privileges, and immunities.'' Only one Senator, Estes Kefauver, dared to vote against it. Irving Howe lamented ''this Congressional stampede to . . . trample . . . liberty in the name of destroying its enemy.''

Hysteria over the Red Menace swept the nation and produced a wide-range of federal, state and local restrictions on free expression and free association, including extensive loyalty programs for government employees; emergency detention plans for alleged ''subversives''; abusive legislative investigations designed to punish by exposure; public and private blacklists of those alleged ''pinkos'' who had been ''exposed''; and criminal prosecution of the leaders and members of the Communist Party of the United States.

The Supreme Court's response was mixed. The key decision, however, was Dennis v. United States, which involved the direct prosecution under the Smith Act of the leaders of the American Communist Party. In a six-to-two decision, the Court held in 1951 that the defendants could constitutionally be punished for their speech under the clear and present danger test even though the Court readily conceded that the danger was neither clear nor present. It was a memorable stroke of judicial legerdemain.

Over the next several years, the Court upheld far-reaching legislative investigations of ''subversive'' organizations and individuals and the exclusion of members of the Communist Party from the bar, the ballot and public employment. In so doing, the Court clearly put its stamp of approval on an array of actions we look back on today as models of McCarthyism.

In the Vietnam War, as in the Civil War and World War I, there was substantial opposition both to the war and the draft. Lest we forget the stresses of those years, let me quote briefly from Theodore White's eyewitness account of the 1968 Democratic Convention:

The demonstrators chant ''Peace Now'' as they approach the Chicago police picketlines. Then, like a fist, comes a hurtling column of police. It is a scene from the Russian revolution. Gas grenades explode. Demonstrators kneel and begin singing America the Beautiful. Clubs come down. ''The Whole World is Watching.''

Over the next several years, the nation entered a period of intense and often violent struggle. After President Nixon announced the American ''incursion'' into Cambodia, student strikes closed a hundred campuses. Governor Ronald Reagan, asked about campus militants, replied: ''If it takes a bloodbath, let's get it over with.'' On May 4, National Guardsmen at Kent State University responded to taunts and rocks by firing their M–1 rifles into a crowd of students, killing four and wounding nine others. Protests and strikes exploded at more than twelve hundred of the nation's colleges and universities. Thirty ROTC buildings were burned or bombed in the first week of May. The National Guard was mobilized in sixteen states. As Henry Kissinger put it later, ''The very fabric of government was falling apart.''

Despite all this, there was no systematic effort during the Vietnam War to prosecute individuals for their opposition to the war. As Todd Gitlin has rightly observed, in comparison to World War I, ''the repression of the late sixties and early seventies was mild.'' There are many reasons for this, including, of course, the rather compelling fact that most of the dissenters in this era were the sons and daughters of the middle class, and thus could not so easily be targeted as the ''other.'' But the courts, and especially the Supreme Court, played a key role in this period. In 1969, the Court, in Brandenburg, overruled Dennis and held that even advocacy of unlawful conduct cannot be punished unless it is likely to incite ''imminent lawless action.'' The Court had come a long way in the fifty years since World War I.

But the Court did not rest there. In other decisions it held that the Georgia House of Representatives could not deny Julian Bond his seat because of his express opposition to the draft; that a public university could not deny recognition to the SDS because it advocated a philosophy of violence; that the government could not conduct national security wiretaps without prior judicial approval; and, of course, that the government could not constitutionally enjoin the publication of the Pentagon Papers, even though the Defense Department claimed that publication would endanger national security.

This is not to say that the government did not find other ways to impede dissent. The most significant of these was the FBI's extensive effort to ''expose, disrupt and otherwise neutralize'' allegedly ''subversive'' organizations, ranging from civil rights groups to the various factions of the anti-war movement. In this COINTELPRO operation, the FBI compiled political dossiers on more than half-a-million Americans.

When these activities came to light they were sharply condemned by congressional committees, and Attorney General Edward Levi declared such practices incompatible with our national values. In 1976, he instituted a series of guidelines designed to restrict the political surveillance activities of the Federal Bureau of Investigation.

What can we learn from this history? I would like to offer at least a dozen observations. But time limits me to only six.

First, we have a long and unfortunate history of overreacting to the perceived dangers of wartime. Time after time, we have allowed our fears to get the better of us.

Second, it is often argued that given the sacrifices we ask citizens (especially soldiers) to make in time of war, it is small price to ask others to surrender some of their peacetime freedoms to help the war effort. As the Supreme Court argued in Korematsu, ''hardships are part of war, and war is an aggregation of hardships.''

This is a seductive, but dangerous argument. To fight a war successfully, it is necessary for soldiers to risk their lives. But it is not necessarily ''necessary'' for others to surrender their freedoms. That necessity must be convincingly demonstrated, not merely presumed. And this is especially true when, as is usually the case, the individuals whose rights are sacrificed are not those who make the laws, but minorities, dissidents and non-citizens. In those circumstances, ''we'' are making a decision to sacrifice ''their'' rights—not a very prudent way to balance the competing interests.

Third, the Supreme Court matters. It's often said that presidents do what they please in wartime. Attorney General Biddle once observed that ''the Constitution has not greatly bothered any wartime President,'' and Chief Justice Rehnquist recently argued that ''there is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt.''

In fact, however, the record is more complex than this suggests. Although presidents may think of themselves as bound more by political than by constitutional constraints in time of war, the two are linked. Lincoln did not propose a Sedition Act, Wilson rejected calls to suspend the writ of habeas

corpus and Bush has not advocated loyalty oaths. The fact is that even during wartime, presidents have not attempted to restrict civil liberties in the face of settled Supreme Court precedent. Although presidents often will push the envelope where the law is unclear, they do not defy established constitutional doctrine.

Fourth, it is often said that the Supreme Court will not decide a case against the government on an issue of military security during a period of national emergency. The decisions most often cited in support of this proposition are, of course, Korematsu and Dennis. In fact, however, there are many counter-examples.

During World War II, the Court upheld the constitutional rights of American fascists in a series of criminal prosecutions and denaturalization proceedings, effectively putting a halt to government efforts to punish such individuals. During the Cold War, the Court rejected President Truman's effort to seize the steel industry and eventually helped put an end to the era of McCarthyism. And during Vietnam, the Court repeatedly rejected national security claims by the Executive. So, although it is true that the Court tends to be wary not to ''hinder'' an ongoing war unnecessarily, it is also true that the Court has a significant record of fulfilling its constitutional responsibility to protect individual liberties—even in time of war.

Fifth, it is useful to note the circumstances that have tended to produce these abuses. They invariably arise out of the combination of a national perception of peril and a concerted campaign by government to promote a sense of national hysteria by exaggeration, manipulation and distortion. The goal of the government in fostering such public anxiety may be either to make it easier for it to gain public acceptance of the measures it seeks to impose or to gain partisan political advantage, or, of course, both. If all that sounds familiar, it should.

Finally, I want to say a word about our responsibilities as lawyers. In each of these episodes, lawyers played an important role, both in imposing the restrictions on civil liberties, and in opposing them. At the moment, I'm more interested in the latter. Albert Gallatin offered brilliant arguments in opposition to the Alien and Sedition Acts. Gilbert Roe defended the free speech rights of dissenters in World War I. Professors Ernst Freund and Felix Frankfurter, of the Chicago and Harvard law schools, played a critical role in illuminating the civil rights violations of the Red Scare and bringing that era to a close. Francis Biddle played a courageous role within the Roosevelt administration during World War II in opposing both the Japanese internment and the prosecution of American fascists. Joseph Welsch, a Boston lawyer, publicly humiliated Senator Joseph McCarthy hearings with his blistering questions ''Have you no sense of decency, sir, at long last? Have you left no sense of decency?'' And a group of lawyers here in Chicago from such organizations as BPI, the ACLU, the Better Government Association and the Alliance to End Repression helped put an end to end COINTELPRO and to the City of Chicago's Red Squad during the Vietnam War.

Now, to return to our own perilous time. The threat of terrorism is real, and we expect our government to protect us. But we have seen disturbing, and all-too-familiar, patterns in our government's activities. To strike the right balance in our time, we need judges who will stand fast against the furies of the age; members of the academy who will help us see ourselves clearly; an informed and tolerant public who will value not only their own liberties, but the liberties of others; and, perhaps most of all, lawyers with the wisdom to know excess when it exists and the courage to preserve liberty when it is imperiled.

Thank you.

ADDITIONAL STATEMENTS

CABOT TEACHES THE VALUE OF DAIRY

● Mr. LEAHY. Mr. President, I am pleased to take this opportunity to commend one of Vermont's most successful farmer-owned enterprises, the world-renowned Cabot Creamery of Vermont. Since its founding by 94 farmers in 1919, Cabot's farm families have preserved the heritage and proud agrarian traditions of the State of Vermont and our great nation.

Cabot has an 80-year history of doing what they do best, making the world's best cheddar cheeses. When Cabot Creamery earned the title of ''Best Cheddar in the World'' and ''Best Flavored Cheddar'' at the 22nd Biennial World Championship Cheese Contest, they did it as a team, steeped in family traditions and pride and with skill and expertise that has been painstakingly built over the generations. That same teamwork goes into every aspect of their business.

In 1992 Cabot joined forces with another New England farmer-owned cooperative, Agri-Mark Inc, to open new markets for Vermont dairy farmers. Today the cheese made by Cabot is from the milk of more than 1,450 Agri-Mark dairy producers throughout Vermont, New England and New York. The Cabot Creamery of Vermont combines the best aspects of both cooperative farming and value-added agricultural products to provide much-needed price premiums to Vermont dairy farmers.

The dairy farmers of Cabot Creamery also have a rich history in teaching their communities about the importance of dairy to the economy and to nutrition and health. Dairy products pack a powerful punch of eight additional nutrients needed for stronger bones and healthier bodies. Throughout New England, Cabot runs the Ag in the Classroom program, an educational program for elementary students that teaches them about agriculture. This program has been recognized by educators as a valuable resource that helps connect students to their communities, raises self-awareness and fosters creativity.

Cabot also has sponsored Calcium Crisis Challenge, a program for 6th—8th-grade students that helps them learn about calcium and its importance for stronger bones and healthy living. The program brings attention to the fact that more than 75 percent of Americans do not get enough calcium in their diets.

This week in Washington, D.C., the dairy farmers of Cabot Creamery will host a reception to highlight the national 3–A–Day education campaign. The 3–A–Day campaign is simple—three servings of milk, cheese or yogurt is a deliciously easy way to help build stronger bones and better bodies. Most Americans are eating only half the daily recommended servings of dairy each day, resulting in loss of bone density and in related health problems. Eating 3–A–Day of dairy is an easy and wholesome way for families to help meet their calcium needs.

Along with Senator JEFFORDS and Congressman SANDERS, I am pleased to join Cabot's involvement with this important education campaign to highlight the importance of dairy products to healthy diets.●

IN HONOR OF NATIONAL BIBLE WEEK

● Mr. MILLER. Mr. President, I am honored and humbled to serve as the Senate Co-chairman of the 2003 National Bible Week. During the week of November 23 to 30, communities and churches across this Nation will participate in this fine tradition by reading and reflecting on the teachings of the Bible. I am very proud to be a part of this celebration and I salute the National Bible Association for its sponsorship of this annual event.

The very first National Bible Week was organized in 1941, during World War II. Organizers created National Bible Week as a way to extend comfort and hope to our Nation during a troubled time. Today, in 2003, we are facing another troubled time when our country could use a dose of comfort and hope. The Holy Bible is our richest source of great inspiration, spiritual guidance and strength. That is why so many refer to it as their solid rock, their foundation.

During National Bible Week, I encourage everyone to read the Bible every day and to pledge to continue to turn to this Good Book throughout the year. Reflecting on Scripture, using the Bible's stories to teach our children right from wrong, and seeking to appreciate the literature on which our great United States of America was established is always time well spent. I congratulate the National Bible Association for its dedication to the celebration of God's word, the Holy Bible.●

MESSAGES FROM THE HOUSE

At 10:44 a.m., a message from the House of Representatives, delivered by Ms. Niland, one of its reading clerks, announced that the House has agreed to the following concurrent resolutions, in which it requests the concurrence of the Senate:

H. Con. Res. 291. Concurrent resolution expressing deep gratitude for the valor and commitment of the members of the United States Armed Forces who were deployed in Operation Restore Hope to provide humanitarian assistance to the people of Somalia in 1993; to the Committee on the Judiciary.

H. Con. Res. 302. Concurrent resolution expressing the sense of Congress welcoming